

NO. 48814-1-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

EMANUEL MOORE, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable James Orlando

No. 15-1-00428-1

BREIF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did defendant waive his claim to an evidentiary issue when he failed to object at the trial court? (Appellant's assignment of error no. 1).
2. Did the trial court properly exercise its discretion in admitting text messages into evidence after sufficient proof was presented to establish a proper foundation for the admission of the messages? (Appellant's assignment of error no. 1).
3. Did defendant fail to establish the State presented insufficient evidence to prove the elements of his conviction for promoting prostitution in the second degree when the evidence presented and viewed in the light most favorable to the State firmly supported the jury's finding that defendant profited from and/or advanced prostitution? (Appellant's assignment of error no. 3).
4. Is defendant barred from raising a challenge to a jury instruction when he did not preserve the claim below and any error does not manifestly affect a constitutional right? (Unenumerated error).

5. Has defendant failed to show defense counsel was constitutionally ineffective for choosing not to object to the admission of properly authenticated evidence and a valid jury instruction? (Appellant's assignment of error nos. 2, 4).

B. STATEMENT OF THE CASE.

1. Procedure

On August 6, 2015, Emanuel J. Moore ("defendant") was charged with promoting prostitution in the second degree (Count I) and unlawful delivery of a controlled substance (Count II) by Amended Information. CP 3-4. The Honorable James Orlando presided over the jury trial. 1RP 1.

After the jury began deliberations, the State proposed Jury Instruction #19 to clarify that the State was arguing for two possible factual scenarios on Count II and the jury must be unanimous as to one of the scenarios. 5RP 518. Defendant and the State drafted agreed upon language reading:

The State alleges that the defendant committed acts of Delivery of a Controlled Substance on January 30th, 2015, either as a principle or as an accomplice. To convict the defendant of Delivery of a Controlled Substance, one particular act of Delivery of a Controlled Substance must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You

need not unanimously agree that the defendant committed all the acts of the Delivery of a Controlled Substance.

CP 84.

The language was sent to the jury without objection. 5RP 523-4.

The jury convicted defendant on Count I, but was unable to agree on Count II. CP 85-86. Defendant was sentenced to 57 months incarceration on Count I. CP 103; 8RP 558. The court also imposed \$800 in mandatory LFOs, a mandatory \$3,000 fine under RCW 9A.88.120, and \$1,200 in discretionary LFOs. CP 101; 8RP 559.

2. Facts

In January 2016, a confidential informant identified defendant as a suspect in a prostitution and drug distribution scheme to an anti-human trafficking task force. Defendant operates under the nickname "BOSS," which he has tattooed on his arm. 4RP 427; Ex. 42. The task force linked defendant to a Backpage web post advertising Michaela Fish for prostitution. 1RP 9-12. They arranged an undercover sting with Ms. Fish at the Western Inn Hotel in Lakewood, Pierce County, Washington for sex acts and to purchase cocaine through a phone number provided in the ad. 1RP 9-11, 26; 2RP 168-177. They scheduled to meet Ms. Fish on January 30, 2016 at 3:15 p.m. 2RP 169-71, 76, 83.

Immediately prior the sting, the task force observed a man enter Ms. Fish's room and leave after approximately 25 minutes. 1RP 18-20.

Defendant entered the room after the man left and returned to his car before undercover officer was scheduled to arrive. *Id.* The undercover officer met Ms. Fish at the hotel at the pre-arranged time. Ms. Fish accepted the cash offer for sex and cocaine and was arrested. Defendant, who was still in the hotel parking lot, was arrested at the same time. 1RP 20-25.

Three cell phones were recovered pursuant to the arrest:

a. Exhibit 10: "Samsung S4" (253) 363-5529

Arresting officers recovered the Samsung S4 on the driver's seat of defendant's car. Ex. 10. Ms. Fish's Backpage ad listed it at the means to contact her for an appointment. 2RP 166-8, 170 Ex. 1. Ms. Fish used the S4 phone to both text and speak to the undercover officer until the scheduled meeting day when Fish no longer answered this phone. 2RP 175-6. Later that day, Officers found Fish's Backpage ad modified to list the Kyocera number instead. 2RP 178; Ex. 3. The Samsung S4 stored the Samsung Exhibit's (Ex. 11) phone number under the contact name "Bos\$," defendant's nickname. Ex.10 at line 24 et. al.

b. Exhibit 11: "Samsung Exhibit" "BOSS" (253) 332-4727

Officers recovered the Samsung Exhibit from the passenger seat of defendant's car. Officers dialed the phone's number while questioning defendant beside his car. 1RP 36-7. The Samsung Exhibit rang in

defendant's car prompting defendant to acknowledge the phone belonged to him. *Id.* Police determined defendant provided the associated number on a traffic accident report a few weeks earlier. 1RP 12. In the Samsung Exhibit, the Kyocera phone (Ex. 11) is stored under contact name \$kill@\$.¹ Ex. 41 at line 1.

c. Exhibit 12: "Kyocera" "\$kill@\$" (253) 468-8632

Officers found the Kyocera on Ms. Fish's person following her arrest. 4RP 382-3. The Kyocera was used to contact the undercover officer on the day of the appointment. 2RP 178. Ms. Fish testified the phone belonged to her. The Kyocera texted the undercover officer asking if he was close to the hotel. 2RP 185. Ms. Fish held a verbal conversation with the officer using the Kyocera. In the Kyocera, the Samsung Exhibit is stored under contact name "BOS\$." Ex. 31 at 50.

d. Communications between the phones.

Forensic analyst extracted information from the cell phones found at the scene and compiled it into three reports. The reports contain text message communications between all three phones depicting the solicitation and promotion of prostitution. Ex. 31, 41, 42.

¹ This is a phonetic/symbolic spelling of "killa" enclosed by 2 dollar signs.

The Samsung S4 contains a host of text messages from potential clients inquiring about engaging Ms. Fish in prostitution and referencing her Backpage ad. Ex. 42. It also contains a number of messages from the Samsung Exhibit (BOS\$) encouraging or directing her prostitution activities. For example:

Now he is gonna no the room number baby...Don't let home in unless he got money...No fuckn stop buys

Ex. 42 at line 125.

Ok baby don't get in no car...Don't get in car talk threw window...Text me if you guys do anything other than stand and talk...Only give him 2 more minutes Im park in back.

Id. at 119-120, 124.

Ok baby yes repost & I will b their at 8:00 luv... Your amazing...If I have not told u lately.

Id. at 78.

He coming? Tell me wen he their

Id. at 32, 25.

The Kyocera (\$kill@\$) appears to have replaced the Samsung S4 as Ms. Fish's primary cell on January 30, 2016. It contains further inquiries about her prostitution services and messages from "bos\$" directing her activity. The text conversations between Bos\$ and \$kill@\$ can be reconstructed using the mobile device reports to show the promotion of prostitution. For example:

bos\$: OK baby...Anything else lined up?

\$kill@: No Is your phone clickin

bos\$: No the g4 is...But its dead time sp no biggi we hone post again at 5:00...Then 9:00.

\$kill@\$: I have a ic common now then a oc²

\$kill@\$: I don't think the first ic is coming

bos\$: OK

\$kill@\$: Nom he's here

bos\$: I'm here how long is lunch

bos\$: U got a regular that will be here at 3:45.

\$kill@\$: Okay. This one is putting on shoes then he's leaving

Defendant filed timely appeal. CP 113.

C. ARGUMENT.

1. DEFENDANT HAS FAILED TO PRESERVE HIS CHALLENGE TO THE ADMISSIBILITY OF THE TEXT MESSAGE EVIDENCE.

A defendant waives his right to appeal an evidence ruling unless he objects at trial. *State v. Guloy*, 104 Wash.2d 412, 422, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020, 106 S. Ct. 1208, 89 L. Ed. 2d 321 (1986); *State v. Davis*, 141 Wn.2d 798, 850, 10 P.3d 977, 1007 (2000). Defendants typically cannot change theories for the suppression of evidence on appeal. *State v. Mak*, 105 Wn.2d 692, 718–719, 718 P.2d 407, *overruled on other grounds by*, *State v. Hill*, 123 Wn.2d 641, 870 P.2d 313 (1994). An appeal's scope should be limited by the objections raised in the trial court. *See* ER 103(a)(1); *State v. Harris*, 154 Wn. App. 87, 94, 224 P.3d 830 (2010); *DeHaven v. Gant*, 42 Wn. App. 666, 669,

² IC and OC are shorthand for, in call and out call, types of prostitution arrangements. *See* 2RP 169-170

713 P.2d 149 (1986) (citing *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020 (1986)); *State v. Boast*, 87 Wn.2d 447, 451, 533 P.2d 1322 (1976). Appellate courts will not generalize specific objections to enable review of new theories. *DeHaven*, 42 Wn. App. at 670. For where the trial court was never asked to rule and did not rule, there is no ruling, and therefore no constitutional error manifest in the record as there must be for unpreserved challenges to the admissibility of evidence to win review. RAP 2.5(a)(3); *State v. Roberts*, 158 Wn. App. 174, 181-82, 240 P.3d 1198 (2010), *review granted*, 172 Wn.2d 1017, 262 P.3d 64 (2011); *State v. O' Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2010); *State v. McFarland*, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995). This narrow exception is not meant to be a means for defendants to obtain new trials whenever unpreserved constitutional issues can be identified. *Id.*

Defendant did not preserve any challenge to the cellular phone evidence admitted by the trial court. Defendant nevertheless urges this Court to reverse his convictions by finding that the admission of such evidence was fatally flawed because the court did not *sua sponte* suppress the evidence. This Court should refrain from reaching the merits of defendant's unpreserved motion to suppress. The defendant's claim should be dismissed.

2. ASSUMING, ARGUENDO, THAT THE DEFENDANT HAD PRESERVED AN OBJECTION TO THE TEXT MESSAGES, SUCH OBJECTION WOULD HAVE BEEN DENIED BECAUSE THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION WHEN IT ADMITTED THE TEXT MESSAGES INTO EVIDENCE.

Authentication as a condition precedent to the admission of documentary or physical evidence is “satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” ER 901(a). Admission of evidence is reviewed for abuse of discretion. *State v. Magers*, 164 Wn.2d 174, 181, 189 P.3d 126 (2008), citing *State v. Pirtle*, 127 Wn.2d 628, 648, 904 P.2d 245 (1995). “Abuse of discretion occurs when a trial court's decision is manifestly unreasonable or based on untenable grounds.” *State v. Bradford*, 175 Wn. App. 912, 927, 308 P.3d 736 (2013), citing *State v. Magers*, 164 Wn.2d at 181.

A party offering evidence must make a prima facie showing of proof sufficient to permit a reasonable fact finder to determine the evidence is authentic. *State v. Young*, 192 Wn. App. 850, 854; 369 P.3d 205 (2016) (quoting *State v. Bashaw*, 169 Wn.2d 133, 140-1, 234 P.3d 195 (2010)). Once a prima facie showing is established, the evidence is admissible under ER 901. *State v. Young*, 192 Wn. App. at 855 (quoting *In re Det. of H.N.*, 188 Wn. App. 744, 751-2, 355 P.3d 294 (2015)). The offeror of the evidence is not required to rule out all theories or explanations inconsistent with authenticity or conclusively prove that

evidence is what it purports to be. *In re Det. of H.N.*, 188 Wn. App. at 751. Any contrary evidence offered by the other party speaks to weight, not admissibility. *State v. Tatum*, 58 Wn.2d 73, 76, 360 P.2d 754 (1961).

The rules of evidence provide a series of non-exhaustive illustrative examples of valid authentication methods including testimony of a witness with “knowledge that the matter is what it is claimed to be,” ER 901(b)(1), and the “appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.” ER 901(b)(4). The rules provide a specific section illustrating some methods for authenticating email messages:

Testimony by a person with knowledge that (i) the email purports to be authored or created by the particular sender or the sender's agent; (ii) the email purports to be sent from an e-mail address associated with the particular sender or the sender's agent; and (iii) the appearance, contents, substance, internal patterns, or other distinctive characteristics of the e-mail, taken in conjunction with the circumstances, are sufficient to support a finding that the e-mail in question is what the proponent claims. ER 901(b)(10).

Divisions One and Two of this Court have both examined text message admissibility using ER 901(b)(10) by analogy. *In re the Detention of H.N.*, 188 Wn. App. 744, 759, 355 P.3d 294 (2015); *State v. Young*, 192 Wn. App. 850, 856, 369 P.3d 205 (2016); *See also*, Karl B. Tegland, Courtroom Handbook on Washington Evidence, § 901.17 (Vol.

5D. 2015-2016) (stating that ER 901(b)(10) serves as a guideline for the authentication of electronic communications including text messages).

In *State v. Young*, 192 Wn. App. 850, 852-3, two defendants used text messages to direct two women in prostitution activities. Defendants' phone numbers were stored in the women's phones under the aliases, "Y.G. and "Papi." *Id.* at 853. Defendants argued on appeal that the trial court abused its discretion when it found the State presented sufficient evidence to authenticate that the texts sent under the aliases originated from the defendants. *Id.* at 854. This Court held the trial court acted reasonably and did not abuse its discretion because the text message recipients had personal knowledge that the messages were sent by defendants using an aliases and the context of the messages confirmed that personal knowledge. *Id.* at 858.

In this case, defendant argues the State failed to conclusively prove defendant was the sender of the text messages. Brief of Appellant at 7-16. Defendant fails to acknowledge that the proponent of the evidence is not required to conclusively prove the evidence is what it purports to be. It is only necessary to present sufficient proof to allow a reasonable fact finder to conclude the evidence proffered is authentic. *State v. Magers*, 164 Wn.2d at 181. To prevail under this standard, defendant must show no reasonable inference can be drawn from the evidence to support admissibility. Several inferences support the authentication of the text messages, therefore the trial court properly admitted them.

Ms. Fish testified the contact in her Kyocera phone labeled "BOS\$" contained defendant's cell phone number. 2RP 250-251. She testified the number associated with the Samsung Exhibit, (253) 332-4727, belonged to defendant, was the number associated with the BOS\$ contact, and that he would contact her using that number. *Id.* The Samsung Exhibit was found in defendant's car at the time of his arrest. Defendant provided the Samsung Exhibit number on an earlier police report. Police officers testified defendant admitted he owned the Samsung Exhibit. Additionally, the use of his unique nickname as a contact label further corroborates the Samsung Exhibit belonged to him and he used it to send messages to Ms. Fish. Therefore, the trial court did not abuse its discretion when it admitted the text message into evidence.

3. THE JURY'S CONCLUSION THAT
DEFENDANT PROMOTED PROSTITUTION IN
THE SECOND DEGREE IS SUPPORTED BY
THE EVIDENCE WHEN VIEWED IN THE
LIGHT MOST FAVORABLE TO THE STATE.

For a court to find there was sufficient evidence for a conviction on review, it must determine, after viewing the evidence in the light most favorable to the State, any rational jury could have found the defendant guilty beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980); *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). An insufficiency claim admits the truth of the State's evidence and all reasonable inferences which can be drawn from it. *State*

v. Thereoff, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980); *State v. Salinas*, 119 Wn.2d at 201. Credibility determinations are for the trier of fact and cannot be reviewed on appeal. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Circumstantial and direct evidence are considered equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Defendant claims the State did not present sufficient evidence to allow a rationale jury to convict him on Count I. Brief of Appellant at 17-8. Defendant does not point to a particular shortcoming in the State's evidence. His claim is without merit as the State presented sufficient evidence to convict defendant on Count I.

Fish had a tattoo on her stomach that said "Boss Lady." 3RP 247. "Boss" is the defendant's nickname. 4RP 427. Detectives found three cell phones used to schedule prostitution at the scene of the arrest, including two in defendant's car. 1RP 26-7; Ex. 10. Text messages on the phones show defendant directing and promoting Ms. Fish in prostitution activities. Ex. 31, 41, 42. The phones contained nude photos of Ms. Fish used in her ads and sent to perspective clients. *Id.* The undercover officer scheduled an appointment and Ms. Fish accepted an offer of cash in exchange for sex and cocaine. 1RP 18-20. During her prostitution activity, she was communicating with the defendant via text messages. Ex. 31, 41, 42. The defendant would hold the money Fish received from prostitution activity. 3RP 234. Fish also testified that the defendant offered her protection from

a former pimp. 3RP 236-237. During the undercover sting, Fish testified that she texted the defendant asking him to stay in the area in case anything unusual occurred. 3RP 242. The abundant text messages promoting prostitution, defendant's presence at the hotel being used for prostitution all allow the conclusion defendant engaged in promoting prostitution. Therefore, the evidence presented, when viewed in the light most favorable to the State, allows a reasonable jury to find defendant guilty on Count I.

4. DEFENDANT FAILED TO PRESERVE A
CLAIM AGAINST THE JURY INSTRUCTIONS
WHEN HE AGREED TO THE PROPOSED
LANGUAGE AT TRIAL.

Defendant appears to argue that trial court erred when it provided Instruction #19 to the jury after deliberations began. The additional instruction was added without objection to clarify the existing instruction on Count II. 5RP 523-5. A defendant generally waives his right to appeal an error unless he timely objects in the trial court. *State v. Kalebaugh*, 183 Wn.2d 578, 583, 355 P.3d 253 (2015). However, if the alleged fault amounts to a "manifest error affecting a constitutional right" the preservation requirement is waived. RAP 2.5(a)(3), *See also Kalebaugh*, 183 Wn.2d at 583, 355 P.3d 253. A manifest error occurs when (1) the error is truly of a constitutional magnitude and (2) the error is manifest. *Id.* An error is manifest when the appellant shows actual prejudice. *State v.*

O'Hara, 167 Wn.2d 91, 99, 217 P.3d 756 (2009). The asserted error must have practical and identifiable consequences in the trial court. *Id.*

Defendant's claim was not preserved because he did not object at trial.

5RP 523-5. Defendant cannot challenge an unpreserved error concerning a jury instruction given after deliberations have begun because it is not a manifest error. *See State v. O'Hara*, 167 Wn.2d at 100-1 (identifying jury instruction errors that have been found to be manifest constitutional error).

Defendant cites to CrR 6.15 (f)(2) in an attempt to find error with the jury instruction.³ Brief of Appellant at 19. This argument misapplies the rule. The rule is concerned with responses to jury questions that would suggest the need for all jurors to come to agreement. It is not intended to prevent the court from instructing the jury they must be unanimous to convict on a given charge as defendant suggests. Such a reading would lead to an absurd result that, its self would be a manifest error. *See State v. Carothers*, 84 Wn.2d 256, 262, 525 P.2d 731 (1974) (holding that failure to require unanimous verdict from jury is manifest constitutional error), *overruled on other grounds, State v. Harris*, 102 Wn.2d 148, 685 P.2d 584 (1984). Additionally, defendant cannot demonstrate the required prejudice arising from the alleged error. Instruction #19 pertained to Count II, a

³ Defendant actually cites to CR 6.15(f)(2), but it is assumed he intended to reference the criminal rule CrR 6.15(f)(2).

count on which the jury did not convict. CP 86. Even if instruction #19 was given in error, there is no prejudice when a conviction did not result on that count. Therefore, defendant's claim that Jury Instruction #19 constituted a reversible error is without merit.

5. DEFENDANT HAS FAILED TO ESTABLISH
COUNSEL'S CONDUCT CONSTITUTED A
CONSTITUTIONAL DEFICIENCY THAT
PREJUDICED HIS TRIAL.

To prevail on an ineffective assistance of counsel claim, a defendant must prove counsel's performance was deficient and the deficiency prejudiced the defense. *State v. Garret*, 124 Wn.2d 504, 518, 881 P.2d 185 (1994) (citing *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)(citing U.S. Const. Amend. 6); *see also* Wash. Const. Art. I § 22). A court evaluating performance must make every effort to eliminate the distorting effects of hindsight. *State v. Brown*, 159 Wn. App. 366, 371, 245 P.3d 776 (2011).

Counsel is only constitutionally deficient when presumptively reasonable representation is demonstrated to fall below an objective standard of reasonableness. *State v. McFarland*, 127 Wn.2d 322, 335, 880 P.2d 1251 (1995); *State v. Grier*, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011). There is a strong presumption that counsel's representation was effective. *McFarland*, 127 Wn.2d at 335; *State v. Brett*, 162 Wn.2d 136,

198, 892 P.2d 29 (1995). A defendant must rebut this presumption by showing that counsel's mistakes "so upset the adversarial balance," *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986) that the trial was unfair and the verdict unreliable. *Id.* See also *Strickland*, 466 U.S. at 693. Even proof of demonstrable tactical errors will not support reversal so long as the adversarial testing envisioned by the Sixth Amendment occurred. *United States v. Cronic*, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984).

The *Strickland* test also requires a defendant to show prejudice resulted from counsel's deficient representation to establish a valid ineffective assistance of counsel claim. *Strickland*, 466 U.S. at 687. Prejudice means there must be a "plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case." *State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011) (quoting *State v. O'Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009)). The defendant must show that the proceeding would have had a different outcome, but for counsel's deficient representation. *McFarland*, 127 Wn.2d at 337; See also *Strickland*, 466 U.S. at 687. The failure of a defendant to show either deficient performance or prejudice defeats his claim. *State v. Emery*, 174 Wn.2d 741, 755, 278 P.3d 653 (2012).

Defendant makes two claims concerning his counsel's conduct, none of which establish counsel was ineffective.

- a. Defendant failed to prove counsel's strategic decision not to object to the admission of the text messages was constitutionally deficient.

Defendant alleges counsel's decision not to object to the admission of the reports containing text messages amounted to ineffective assistance of counsel. Brief of Appellant at 20. The decision of when or whether to object is a classic example of trial tactics. Only in egregious circumstances will the failure to object constitute incompetence of counsel justifying reversal. *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989) (citing *Strickland*, 466 U.S. at 763). Claims of ineffective assistance based on counsel's failure to object must show: (1) an absence of legitimate strategic or tactical reasons supporting the challenged conduct; (2) the objection would have likely been sustained; and (3) the result of the trial would have been different if the objection was successful. *See generally State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998). Proof of demonstrable tactical errors will not support reversal so long as the adversarial testing envisioned by the Sixth Amendment occurred. *United States v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984).

Defendant's claim is without merit. First, counsel had a legitimate strategic reason to withhold an objection to the admissibility of the reports—they were admissible. Fish testified that the phone number for the Samsung Exhibit phone was the defendant's number. 3RP 250-251. The distinctive characteristics of the text messages taken in conjunction with the overall circumstance further bolster the admissibility of the text messages. Therefore, counsel conceivably made the strategic decision that a frivolous objection would damage the credibility of his case before the jury. Therefore, defendant has failed to show counsel was ineffective for failing to object to clearly admissible evidence.

- b. Defendant failed to prove counsel's strategic decision not to object to Jury Instruction #19 was constitutionally deficient.

Defendant alleges his counsel was constitutionally deficient for not objecting to Jury Instruction #19. Brief of Appellant at 24. Arguments unsupported by applicable authority and meaningful analysis should not be considered. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); *State v. Elliott*, 114 Wn.2d 6, 15, 785 P.2d 440 (1990); *Saunders v. Lloyd's of London*, 113 Wn.2d 330, 345, 779 P.2d 249 (1989); *In re Disciplinary Proceeding against Whitney*, 155 Wn.2d 451, 467, 120 P.3d 550 (2005) (citing *Matter of Estate of Lint*, 135 Wn.2d

518, 532, 957 P.2d 755 (1998) (declining to scour the record to construct arguments for a litigant); RAP 10.3(a).


As discussed above, there was no fault with Instruction #19 and defendant has failed to allege any fault beyond an unsupported claim the instruction was untimely. Defendant alleges counsel was deficient for failing to object to the “untimely jury instruction,” cites to case law regarding situations where an attorney is unaware of a point of law, and then alleges counsel should have researched ER 901 and “CR 6.15.” Brief of Appellant at 25. The record does not support that counsel was unaware of the law in this area. Moreover, as argued above, any error that may have occurred with instruction #19 related to count II only, and the defendant was not convicted of count II. Even if counsel was deficient, any prejudice was eliminated by the jury’s failure to conviction on count II. Therefore, defendant’s claim is meritless and should be rejected.

D. CONCLUSION.

For the above reasons, the State respectfully requests defendant's conviction be affirmed.

DATED: December 21, 2016

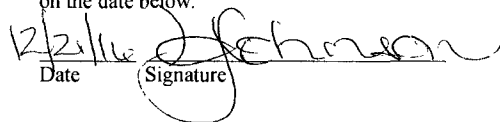
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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.


Date Signature

PIERCE COUNTY PROSECUTOR

December 21, 2016 - 10:37 AM

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